IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1720

JOHN M. DALEY,

Petitioner,

vs

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,

Respondent.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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QUESTIONS PRESENTED.

For the purpose of argument, Respondent will address the questions as raised by Petitioner.

REASONS FOR NOT GRANTING THE WRIT.

I.

THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT, THAT A DISCIPLINARY PROCEEDING IS NOT ONE FOR "PENALTY" OR "FORFEITURE" WITHIN THE MEANING OF THE FIFTH AMENDMENT'S SELF INCRIMINATION CLAUSE, IS NOT INCONSISTENT WITH THE JUDGMENTS OF THIS COURT AND OF ANOTHER UNITED STATES COURT OF APPEALS.

Analysis of the cases referred to by Petitioner reveals that the decision of the Court of Appeals in this matter is consistent with prior decisions of this Court and other Courts of Appeals, as well as with the overwhelming weight of state authority.

By his reference to *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892) (*Petition*, p. 8), Petitioner ignores, as he has throughout the proceedings below, the later decisions of this Court which have greatly limited the "penalty and forfeiture" concept of the privilege against self-incrimination. *Brown* v. *Walker*, 161 U. S. 591 (1896), *Ullman* v. *United States*, 350 U. S. 442 (1956). *Murphy* v. *Waterfront Commission of New York*, 378 U. S. 52 (1964), *Gardner* v. *Broderick*, 392 U. S. 273 (1968). It was in response to *Brown*, *Ullman*, *Murphy*, and *Gardner*, that Congress in 1970 enacted the Immunity Act, 18 U. S. C. § 6002, which affords immunity from the use of compelled testimony "in any criminal case." In *Kastigar* v. *United States*, 406 U. S. 441 (1972), this Court upheld the provisions of 18 U. S. C. § 6002 as being coextensive with the protection afforded by the privilege.

Petitioner relies upon *Boyd* v. *United States*, 116 U. S. 616 (1886) in support of his contention that the privilege against self-incrimination precludes the use of compelled testimony

against the witness in subsequent cases involving penalties and forfeitures. Petitioner's reliance upon *Boyd* is not well founded.

Boyd involved the compulsory production of books and records in a suit for the forfeiture of property alleged to have been imported without payment of import taxes as required by statute. The statute provided for criminal penalties (fine and imprisonment) and for the forfeiture of the imported merchandise. The prosecutor waived indictment and sought only the forfeiture of the goods. This Court held that a case in which the issue was whether the criminal statute had been violated is a criminal case for the purpose of invoking the privilege against self-incrimination.

The Court below recognized the difference between the instant matter and the situation as it existed in *Boyd:*

> . . . [A] "criminal case," for the purpose of the invocation of the Fifth Amendment privilege is one which may result in sanctions being imposed upon a person *as a result of his conduct being adjudged violative of the criminal law.*
>
> The essence of state bar disciplinary proceedings, however, is not a resolution regarding the alleged criminality of a person's act, but rather a determination of the moral fitness of an attorney to continue in the practice of law. Although conduct which could form the basis for a criminal prosecution might also underline the institution of disciplinary proceedings, the focus is upon gauging an individual's character and fitness, and not upon adjudging the criminality of his prior acts or inflicting punishment for them. *In re John M. Daley*, 549 F. 2d 469 at 474. (Emphasis added.)

Petitioner's reliance upon *Spevack* v. *Klein*, 385 U. S. 511 (1967) is likewise misplaced. In *Spevack*, this Court held that an attorney may assert the privilege against self-incrimination in response to questions asked in a disciplinary proceeding and he may not be disbarred or otherwise punished for doing so. This Court stated, "Lawyers are not excepted from the words

'No person . . . shall be compelled *in any criminal case* to be a witness against himself.' " *Spevack* v. *Klein*, 385 U. S. at p.516. (Emphasis added.) Accord with the decision below in this case, rather than discord, is apparent.

Petitioner calls this Court's attention to *Ex parte Garland*, 4 Wall 333 (1867) and *In re Ruffalo*, 390 U. S. 544 (1968), as being instances of this Court's willingness to characterize the discipline of an attorney as being "punishment" or "a penalty."

Respondent agrees that the imposition of discipline on a given attorney may have the effect of working a hardship. However, the Court below pointed out that for Fifth Amendment purposes, the focus of inquiry should be upon the nature rather than the effect of the proceeding:

> Thus, a clear distinction exists between proceedings whose essence is penal, intended to redress criminal wrongs by imposing sentences of imprisonment, other types of detention or commitment, or fines, and proceedings whose purpose is remedial, intended to protect the integrity of the courts and to safeguard the interests of the public by assuring the continued fitness of attorneys licensed by the jurisdiction to practice law. The former type of proceeding is in actuality "criminal" in nature and therefore within the ambit of the Fifth Amendment safeguards against self-incrimination; the latter is not. *In re Daley, supra*, at p. 475.

In re Ruffalo, supra, did not involve any issue concerning the application of the privilege against self-incrimination. Rather, the Court held that due process requires that an attorney be given notice of the charge and an opportunity to defend prior to discipline being imposed. Significantly, the Court commented, "Such procedural violation of due process would never pass muster in any normal civil or criminal litigation." *In re Ruffalo*, 390 U. S. at 550-551.

Finally, Petitioner points to *Erdmann* v. *Stevens*, 458 F. 2d 1205 (2d Cir. 1972), a decision he believes to be inconsistent with the decision of the Court of Appeals in this case. Like

Ruffalo, supra, the *Erdmann* case does not involve any question of the application or scope of the privilege against self-incrimination. Rather, in *Erdmann*, the Court of Appeals sought to apply the non-intervention doctrine of *Younger* v. *Harris*, 401 U. S. 37 (1971), which held that the federal courts should not intervene in pending state criminal prosecutions absent a certain showing of bad faith. In order to bring the disciplinary proceeding involved in *Erdmann* within the mandate of *Younger*, the *Erdmann* Court found it necessary to construe disciplinary proceedings as being "comparable to a criminal rather than a civil proceeding." *Erdmann* v. *Stevens*, 458 F. 2d at p. 1209.

Significantly, in *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975), this Court extended the principle enunciated in *Younger* to questions of federal intervention in state civil proceedings as well, thereby eliminating the need for such tortuous reasoning as is found in *Erdmann* v. *Stevens, supra.*

The judgment of the Court of Appeals for the Seventh Circuit is not in conflict with any decision of this Court or of any Court of Appeals. All the cases, both federal and state, which have considered the question, conclude that an attorney disciplinary proceeding is not a "criminal case" within the purview of the privilege against self-incrimination or 18 U. S. C. § 6002.

II.

THE JUDGMENT BELOW, THAT THE FEDERAL COURT'S AUTHORITY TO PROTECT THE INTEGRITY OF ITS PROCESSES DOES NOT EXTEND TO PRECLUDING THE USE OF IMMUNIZED TESTIMONY IN A STATE DISCIPLINARY PROCEEDING, IS CONSISTENT WITH THE JUDGMENTS OF THIS COURT AND OTHER COURTS OF APPEALS.

Petitioner is mistaken in asserting that the Court of Appeals rejected *sub silentio* his argument that the federal courts possess inherent equitable powers over their own processes to prevent abuse. Rather, the Court of Appeals specifically acknowledged

that power but held that an immunity order issued pursuant to 18 U. S. C. § 6003 is not a matter of judicial process or discretion except in a ministerial sense. The immunity power originates in the legislature and its exercise is delegated solely to the executive, *In re Daley*, 549 F. 2d at p. 479. The Court below further pointed out that Congress has equipped the federal prosecutor with potent tools, a prosecution for perjury or for contempt, which he may wield in assuring the integrity of the testimony compelled. *In re Daley*, 549 F. 2d at p. 480.

Nevertheless, Respondent persists in suggesting that federal courts possess concurrent authority with the executive to concern themselves with such matters. Petitioner relies first on the All Writs Act, 28 U. S. C. § 1651, a codification of the federal court's long recognized power to issue writs which may be necessary and appropriate for the exercise of their respective jurisdictions.

This Court, however, has delineated the role and function of the prerogative writs as codified by 28 U. S. C. § 1651. The Court stated:

> *Unless appropriately confined by Congress*, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269 at p. 273 (1942). (Emphasis added.)

Respondent suggests that the mandate of 18 U. S. C. § 6002 —that no testimony compelled under a grant of immunity may be used against the witness "in any criminal case"—constitutes appropriate confinement by Congress.

Consideration of the four remaining authorities referred to by Petitioner reveals no inconsistency with the decision of the Court below in this matter.

Gumbel v. *Pitkin*, 124 U. S. 131 (1888), only affirmed the equitable power of the federal court to redress injuries occa-

sioned by the abuse of its own process. A federal marshal, through service of an invalid writ of attachment, had improperly taken property into custody, preventing service of an otherwise proper writ of attachment issued by a state court. This Court directed that the aggrieved party be given proper priority in the distribution of proceeds resulting from the sale of the property.

In *Sperry Rand Corp.* v. *Rothlein*, 288 F. 2d 245 (2d Circuit, 1961) the Court of Appeals affirmed the district court's injunction against Sperry Rand from using information obtained through discovery in a suit in a federal court against the same defendant in a similar suit in a state court. In the federal case, the district court established a schedule of discovery and Sperry Rand was afforded priority. Sperry Rand sought to obtain advantage by using the federal discovery material in the state proceeding. It is significant, in light of the issue presented in this case, that before affirming the injunction against Sperry Rand, the Court of Appeals first concluded that to do so would not contravene the mandate of 28 U. S. C. § 2283 (The Anti-Injunction Statute) by staying a state proceeding.

In *United States* v. *United Fruit Co.*, 410 F. 2d 553 (5th Circuit, 1969), the Court of Appeals affirmed the district court's denial of a motion by a competitor of United Fruit to allow the competitor to inspect divestiture plans filed by United Fruit pursuant to a final consent judgment entered in a civil anti-trust suit against United Fruit. The competitor was not a party to the anti-trust suit. The divestiture plans were the subject of a protective order issued pursuant to F. R. C. P. 30(b) which provided that third parties could not without express order inspect documents filed with the court. The only issue presented on appeal, material to this case, was whether the order contravened the provisions of the Publicity in Taking Evidence Act (15 U. S. C. § 30). The court concluded that it did not.

Finally, in *Rea* v. *United States*, 350 U. S. 214, 76 S. Ct. 292, 100 L. Ed. 233 (1956), this Court exercised its supervisory

power over federal law enforcement agencies. The Court enjoined a federal agent who sought to avoid the effect of Rule 41(a) of the Federal Rules of Criminal Procedure by testifying in a state criminal proceeding about an illegal search. This court enjoined the agent "merely to enforce the federal Rules against those owing obedience to them." *Rea* v. *United States*, 350 U. S. at 217.

The cases referred to by Petitioner stand only for the proposition that the federal courts may issue orders in aid of valid jurisdiction. They do not provide the courts with an independent source of power whereby otherwise unauthorized acts might be validated. They are not inconsistent with the decision of the Court below.

III.

THE COURT OF APPEALS, IN HOLDING THAT THE ORDER OF THE TRIAL COURT PURPORTING TO PRECLUDE THE USE OF RESPONDENT'S IMMUNIZED TESTIMONY IN A STATE DISCIPLINARY PROCEEDING WAS ILLEGAL, HAS NOT VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The Court below found that the United States Attorney acted outside the scope of his jurisdiction by exceeding the authority delegated to him. *In re Daley, supra* at p. 480. Petitioner nevertheless contends that for the "government" to turn its back on "its commitments" is a denial of elementary fairness. (*Petition*, p. 14). The cases referred to by Respondent do not support his contention that the exercise of the legitimate and independent power of the Illinois Supreme Court should be barred because of "the word of the United States and the word of a United States District Court" (*Petition*, p. 14), however erroneous.

Appellee relies on *Johnson* v. *U. S.*, 318 U. S. 189, 63 S. Ct. 548, 87 L. Ed. 704 (1943). In *Johnson*, the Court held that as it is improper for the prosecutor to comment on the silence of a defendant in a criminal case, it is also improper for the prosecutor to comment to the jury on a witness' assertion of the privilege against self-incrimination.

In *Johnson*, the defendant in a criminal case took the stand in his own defense and was allowed by the trial court to assert the privilege against self-incrimination in response to certain questions asked during cross-examination. As a collateral matter this Court pointed out, that it would not have been error for the trial court to deny petitioner's claim of privilege, *Johnson* v. *U. S.*, 318 U. S. at 196. By taking the stand, the Court held, the defendant waived the privilege as to all relevant matters. However, whether the privilege was properly afforded or not, once it was granted, the defendant's decision to claim it might have been different had he known it would be submitted to the jury as evidence. The prejudice did not occur when the court erred in allowing the defendant to claim the privilege. The prejudice resulted when the court allowed his claim of the privilege to be submitted to the jury in argument. The court stated, "The fact that the *privilege* is mistakenly granted is immaterial", *Johnson* v. *U. S.*, 318 U. S. at 197. (Emphasis added.)

Raley v. *Ohio*, 360 U. S. 423, 70 S. Ct. 1257, 3 L. Ed. 2d 1344 (1959), involved the testimony of certain witnesses before the Ohio Un-American Activities Commission. At the time they testified, the witnesses were unaware of an Ohio statute which *automatically* granted immunity to any person appearing before a legislative committee. During their testimony, the witnesses on several occasions claimed the privilege against self-incrimination and they were informed by the Commission that they had a right to do so. At no time were they advised of the existence of the immunity statute or that the privilege against self-incrimination was not available to them. As a result of claiming the privilege, they were convicted of contempt for failing to answer questions before the Commission.

The Ohio Supreme Court affirmed the convictions. This Court reversed, stating: "Since the defendants were apprised by the Commission at the time they were testifying that they

had a right to refuse to answer questions which might incriminate them, they could not possibly in following the admonition of the commission be in contempt of it." *Raley* v. *Ohio*, 360 U. S. at 426.

In *Cox* v. *Louisiana*, 379 U. S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965), Cox had been convicted for parading "in or near" a courthouse in violation of a Louisiana statute. In reversing the conviction, this Court held that the statute was valid on its face, but suggested that "the statute, with respect to the determination of how near the courthouse a particular demonstration can be, foresees a degree of on-the-spot administrative interpretation by officials charged with responsibility for administering and enforcing it." *Cox* v. *Louisiana*, 379 U. S. at p. 568. In leading the demonstration which resulted in his conviction, Cox relied upon the representation of officials who were present that the demonstration could be properly conducted across the street from the courthouse.

Citing *Raley* v. *Ohio* (*supra*), this Court held, "As in *Raley*, under all the circumstances of this case, after public officials acted as they did, to sustain appellant's later conviction for demonstrating where they told him he could 'would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him.' The Due Process Clause does not permit convictions to be obtained under such circumstances." *Cox* v. *Louisiana*, 379 U. S. at 571.

The aforementioned decisions significantly differ from the situation in this case and are not inconsistent with the decision of the Court below in any way. The "indefensible sort of entrapment" found in *Raley* and *Cox* was the attempt by Ohio and Louisiana, respectively, to obtain an advantage as a result of their own misleading acts.

CONCLUSION.

The Court of Appeals held in this matter that neither the privilege against self-incrimination nor 18 U. S. C. § 6002 precludes the use of immunized testimony as evidence in a state disciplinary proceeding. The Court of Appeals correctly held that a disciplinary proceeding is not a "criminal case" within the purview of the Fifth Amendment. Further, the Court of Appeals held that the federal court's equitable power to protect the integrity of its own processes cannot justify an order restraining a state from exercising its independent and proper jurisdiction.

The decision of the Court of Appeals in this matter is in accord with the decisions of this Court construing the scope of the privilege against self-incrimination and it is not inconsistent with the decision of any other Court of Appeals. For these reasons, Respondent prays that this Court deny the issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

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